

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Marshall Helmberger and  
Timberjay Newspapers (Complainant) v.  
Johnson Controls, Inc., (Respondent)

**ORDER DENYING RENEWED  
REQUEST FOR DISMISSAL**

By Order dated September 14, 2011, the above-entitled matter was dismissed by Administrative Law Judge Eric Lipman (the ALJ). On September 23, 2011, the Complainant filed a Petition for Reconsideration and, by Order dated October 4, 2011, the Chief Administrative Law Judge (CALJ) granted the petition and directed that this matter be set on for an evidentiary hearing.

On October 11, 2011, Respondent filed a "Renewed Request for Dismissal" with the OAH. On October 12, 2011, Complainant filed a response to Respondent's "Renewed Request."

David L. Lillehaug and Christopher Stafford, Fredrikson & Byron, appeared on behalf of Respondent. Mark R. Anfinson, Attorney at Law, appeared on behalf of the Complainant.

IT IS HEREBY ORDERED:

This matter is referred to Administrative Law Judge Lipman for further proceedings consistent with this Order.

Dated: October 14, 2011

s/Raymond R. Krause  
RAYMOND R. KRAUSE  
Chief Administrative Law Judge

**MEMORANDUM**

A Petition for Reconsideration is governed by Minn. Stat. § 13.085, subds. 3 (b) (2) and (c).

(b) (2) if the complaint is dismissed for failure to present sufficient facts to believe that a violation of this chapter has occurred, the notice must inform the parties of the right of the complainant to seek

reconsideration of the decision on the record by the chief administrative law judge, as provided in paragraph (c).

(c) A petition for reconsideration may be filed no later than five business days after a complaint is dismissed for failure to present sufficient facts to believe that a violation of this chapter has occurred. The chief administrative law judge must review the petition and make a final ruling within ten business days after its receipt. If the chief administrative law judge determines that the assigned administrative law judge made a clear material error, the chief administrative law judge must schedule the matter for a hearing as provided in subdivision 4.

Respondent alleges that the CALJ improperly used material outside of the record in making the decision to grant the Request for Reconsideration. Respondent is incorrect, ill considered and intemperate.

The relevant items in the record at the time of the Order Granting Reconsideration were 1) the Complaint, 2) the Response; and 3) the Request for Reconsideration. Those were the only documents before the CALJ and the only documents relied upon to issue the Order Granting Reconsideration.

Other items were submitted by the Complainant and the Commissioner of Administration. The letter from the Commissioner of Administration and the materials submitted by Mr. Anfinson subsequent to his filing of the Request for Reconsideration are not part of the official record to this point and were not considered in making the decision to grant the Request for Reconsideration. Simply because someone submits something to a judge does not mean the judge accepts it, reads it or considers it.

Respondent also suggests the CALJ's use of quotes from the Request for Reconsideration is improper. The Request for Reconsideration **is** a part of the record. The quoted material was under the heading "Reconsideration Argument" and was included to advise the reader of Complainant's argument.

The terms and scope of the contracts at issue are, to this point, not in the record. The Complaint and Response are replete with references to differences of opinion between Complainant and Respondent about the contract's scope and the legal implications of that scope.

The Complaint, the Response and the Request for Reconsideration all reference the previous advisory opinions of the Commissioner of Administration, which in any case are public documents. The CALJ reviewed the actual decisions, not the summary provided by the Commissioner. Respondent's allegations that the CALJ used *ex parte* sources are simply false and deliberately misleading. The CALJ made no ruling on whether the Advisory Opinions controlled, simply that there were facts, not in the record, that needed to be produced before it is possible to make a decision on whether deference is due. The Order of the CALJ was made on the basis of a review of the

ALJ's Order of Dismissal, the documents properly included in the record, case law, statutes, and Advisory Opinions of the Department of Administration and nothing else.

Because the record clearly indicates a fact issue exists as to the content and scope of the contracts at issue, it was error to dismiss the matter at the probable cause stage. In addition, the CALJ held that it was error not to give deference to the Commissioner's Advisory Opinion at this stage before the facts were fully revealed. The Advisory Opinions may or may not require deference. At this stage, however, without more facts, it is not possible to make a ruling on that issue.

Finally, Respondent claims that it was denied the right to respond to the Request for Reconsideration. No such right exists. The rules do not provide for a response to a Request for Reconsideration nor do they provide for any motion to a CALJ by the losing party after an Order Granting Reconsideration.

For all the reasons discussed above, the "Renewed Request for Dismissal" is denied.

**R. R. K.**